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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1558

PAUL LORIN KANTNER, CLAUDE ERNEST WINTER
and DAVID ALLEN NOWELL, *Petitioners*

vs.

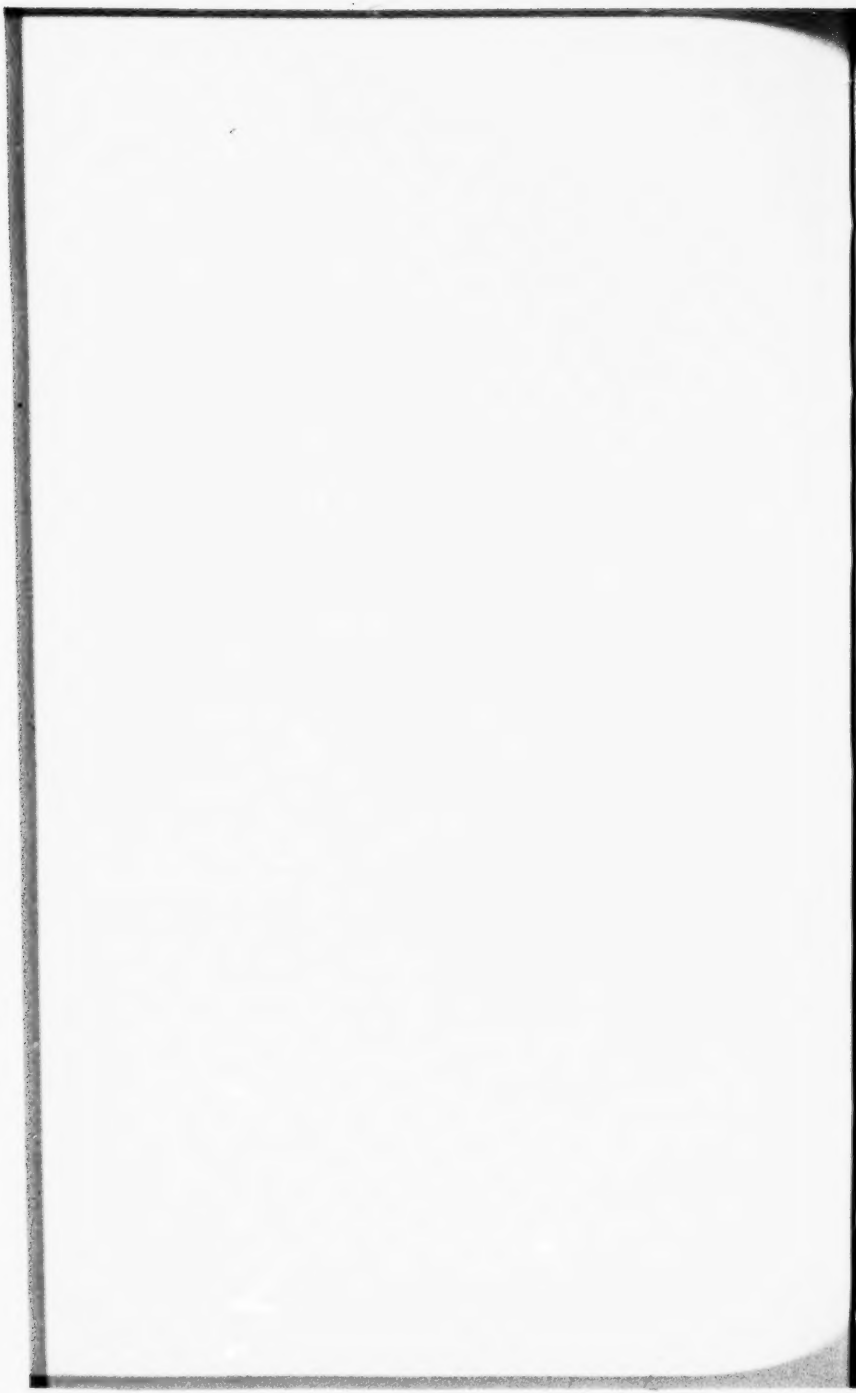
STATE OF HAWAII, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Hawaii

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 493 P.2d 306 and is set out in Appendix A of the Petition together with a copy of the order denying rehearing entered on February 25, 1972 (Appendix B of the Petition) and the order denying amended petition for rehearing and motion to stay issuance of the mandate entered on April 10, 1972 (Appendix C of the Petition).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the provisions of Section 329-5 Hawaii Revised Statutes, as amended, prohibiting the private possession of marijuana meet the Due Process minimum requirement of "reasonableness."

Whether Section 329-5 Hawaii Revised Statutes, as amended, must meet the Due Process requirement of "compelling state interest" because the statute prohibits the exercise of a fundamental liberty guaranteed to petitioners, the "right to smoke marijuana."

Whether Sections 329-1 and 329-5 Hawaii Revised Statutes, as amended, meet the Equal Protection minimum requirement of "rationality" in the statutory classification and treatment of marijuana as a "narcotic."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14.

Hawaii Revised Statutes, Sections 329-1 and 329-5, as amended, as set out on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE

We concur in Petitioners' statement of the case with the following exceptions: 1) we do not concur in Petitioners' summary of the evidentiary hearing held in the First Circuit Court of Hawaii, and 2) we do not agree with Petitioners that the Illinois Supreme Court in *People v. McCabe, infra,* and *People v. Hudson, infra,* reached a conclusion opposite to that reached by the Hawaii Supreme Court below.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The State opposes the granting of the Petition for Writ of Certiorari in this case.

Petitioner Kantner was convicted for possession of marijuana. The trial court treated the conviction as a misdemeanor and sentenced Petitioner to pay a $150 fine under the provisions of Section 329-5, Hawaii Revised Statutes (H.R.S.), as amended. Petitioners Nowell and Winter were subjected to revocation of probation for possession of marijuana in violation of H.R.S. 329-5, as amended. Petitioners contend that the penalties they have suffered under Hawaii's statutory scheme that classifies and regulates marijuana as a "narcotic" have violated their federal constitutional rights to Due Process and Equal Protection of the law.

Although Petitioners' statement of the question presented seems simple and straightforward, the question consists of a number of issues not explicitly obvious and not clearly delineated in Petitioners' argument. We have rephrased the issue presented by Petitioners into three issues which Petitioners' arguments seem to imply are included in the broad issue stated in their Petition. We oppose certiorari because, on all the issues that we believe are properly raised by Petitioners, the reasoning of Chief Justice Richardson in the Hawaii Supreme Court opinion below was clearly correct. Also, we find the decision below consistent with cases like *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407 (1971); *People v. Hudson*, 50 Ill.2d 1, 276 N.E.2d 345 (1971), *cert. denied*, 40 U.S.L.W. 3412 (1972), and *English v. Miller*, 341 F.Supp. 714 (USDC E.D. Va. 1972), which appear, at first blush, to answer the question as phrased by Petitioners in the Petition in their favor.

II.

SECTION 329-5 HAWAII REVISED STATUTES, AS AMENDED, MEETS THE DUE PROCESS MINIMUM REQUIREMENT OF "REASONABLENESS."

Petitioner correctly states the minimum Due Process requirement that every law must seek to achieve a valid legislative object by reasonable means rationally related to a legitimate end. The "legitimate end" involved here is control of drug abuse. The "means" to achieve that end can be divided into three areas of inquiry which should be explored to determine the reasonableness of the means employed by the State of Hawaii: 1) the **classification** of marijuana as a "narcotic," 2) the **treatment** of marijuana by law in relation to the treatment of other drugs classified as "narcotic," and 3) the **prohibition** of the private possession of marijuana.

With respect to the first two areas, Petitioners' basic argument seems more akin to the equal protection aspects of Due Process which we would consider properly placed and argued wholly under the question of whether or not Petitioners' rights to Equal Protection of the law were violated.

The Court below does point out with respect to classification that no Due Process notice requirements are violated by the use of the word "narcotic" in reference to marijuana. pp. v-vi of Appendix A of the Petition.

With respect to prohibition of the private possession of marijuana, the argument under the minimum test of reasonableness discussed here would seem to be that made by Justice Kobayashi in his dissent in the opinion below. Justice Kobayashi weighed the presently incomplete scientific data about marijuana and its organized illicit trafficking against the problem of widespread disregard of the marijuana laws by the youth of the State and decided that the prohibition of private possession of marijuana was unreasonable since it continued "to make crimi-

nals out of and consequently alienate the youth of today." p. xxxiii of Appendix A of the Petition. While such logic is desirable and commendable, we believe such a weighing process must properly be made by the legislature and not the courts under the demands of Due Process, especially considering the facts that marijuana is a "mind-altering" drug used extensively throughout the country and much research into its long-term effects and short-term interaction in the body with other drugs is still necessary. We urge the Court in this case to decline, as it did in *Griswold, infra,* 381 U.S. at 481-82, to accept the invitation of *Lochner v. New York,* 198 U.S. 45 (1905), to "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." See the opinion of Chief Justice Richardson below, p. x of Appendix A of the Petition.

III.

THE "RIGHT TO SMOKE MARIJUANA" DOES NOT EXIST AS A FUNDAMENTAL LIBERTY. SECTION 329-5, HAWAII REVISED STATUTES, AS AMENDED, NEED NOT MEET THE STRICT DUE PROCESS REQUIREMENT OF "COMPELLING STATE INTEREST."

Petitioner obliquely raises what we feel to be the most important issue in this case, the question of whether or not the "right to smoke marijuana" exists as a fundamental liberty. If such a right does exist as a fundamental liberty, the State must show a compelling interest for the prohibition of the private possession of marijuana.

Justice Levinson, in dissent, made as articulate a defense of the "right to smoke marijuana" position as we have read in any case. We feel, however, that Justice Levinson has clearly strained the holdings in *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965) and *Stanley v. Georgia,* 394 U.S. 557,

22 L.Ed.2d 542, 89 S.Ct. 1243 (1969), far beyond their important but restricted scope. Those cases dealt with activities intimately connected with First Amendment liberties that went to the very core of our civil and political institutions and the fabric of ordered liberty. The "right to smoke marijuana" does not involve such fundamental issues. It would be extending the concept of the "right of privacy" considered in *Griswold* and *Stanley* far beyond the clear intentions of this Court to include therein the "right to smoke marijuana." We agree with Chief Justice Richardson's reasoning below: "Our reading of *Griswold v. Connecticut* . . . leads us to conclude, as did the court in *People v. Aguiar*, 257 Cal. App.2d. 597, 65 Cal.Rptr. 171, *cert. denied*, 393 U.S. 970 (1968), that there is no fundamental guarantee protecting the use and possession of euphoric drugs." pp. ix-x of Appendix A of the Petition. That being the case, this Court need not reach the issue of whether or not there exists a "compelling state interest." The State need only show that its regulatory scheme with respect to marijuana is reasonable and rational.

IV.

SECTIONS 329-1 AND 329-5, HAWAII REVISED STATUTES, AS AMENDED, MEET THE EQUAL PROTECTION MINIMUM REQUIREMENT OF "RATIONALITY."

Petitioners' Equal Protection argument has no merit. In *Sinclair*, *McCabe*, *Hudson*, and *Miller*, cited in the Introduction to the argument in this Brief in Opposition, marijuana was not only classified as a "narcotic" but also treated exactly the same as all the drugs defined as "narcotic." With respect to the mere classification of marijuana as a "narcotic," it is clear that the legislature of the State of Hawaii has broad powers to make such a classification. *State v. Johnston*, 51 Haw. 195, 456 P.2d 805 (1969); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 82 L.Ed.2d 1024, 58 S.Ct. 721 (1968);

Continental Baking Co. v. Woodring, 286 U.S. 352, 371, 76 L.Ed. 1155, 52 S.Ct. 595 (1932). *Sinclair, supra,* and *McCabe, supra,* especially, held that marijuana is not a "narcotic" scientifically defined, is less harmful than "narcotics" scientifically defined, and should therefore be treated less harshly than "narcotics" scientifically defined. It is abundantly clear from a reading of these cases that the courts, in overturning their States' respective laws prohibiting possession and sale of a small amount of marijuana, were repulsed by the unduly heavy penalties involved. We do not agree with the Equal Protection arguments made in those cases under the old Narcotic Drug Act, but this Court need not confront the issue. In Hawaii, marijuana possession is treated differently from and less harshly than the possession of other drugs defined as "narcotic." Under H.R.S. 329-5, as amended, a first conviction for possession of "narcotics" bears a five year penalty while possession of marijuana can be treated as a misdemeanor or a felony, with a possible five year sentence, at the discretion of the trial judge. Petitioner Kantner's conviction was treated as a misdemeanor. Only a misdemeanor conviction for possession of marijuana is before this Court. *See* the opinion below, p. vi of Appendix A of the Petition. Hawaii's legislative scheme embodied in H.R.S. 329-5, as amended, would meet even the strict tests of "rationality" imposed by the *Sinclair, McCabe, Hudson,* and *Miller* courts. There is no substantial issue of Equal Protection raised by the facts in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in this case be denied.

Respectfully submitted,

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September, 1972